Supreme Court, U.S.
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IN THE
Supreme Court of the United States

ALLIANCE LOGISTICS, INC.,
N/K/A ALLIANCE 3PL CORP.,

Petitioner,

v.

NEW PRIME, INC., D/B/A PRIME INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DANIEL P. ALBERS
Counsel of Record
WILLIAM M. MCERLEAN
BRAD E. RAGO
JAMES E. MICHEL
BARNES & THORNBURG, LLP
One North Wacker Drive,
Suite 4400
Chicago, Illinois 60606
(312) 357-1313
dalbers@btlaw.com

Attorneys for Petitioner

233480

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether a federal court of appeals may reverse a jury verdict and direct entry of judgment for the verdict loser based on a sufficiency of evidence issue not raised in a Federal Rule of Civil Procedure 50(a) motion for judgment as a matter of law.

PARTIES TO PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 14.1(b), the case caption contains the names of all the parties to the proceeding in the United States Court of Appeals for the Seventh Circuit.

Petitioner, Alliance Logistics, Inc., n/k/a Alliance 3PL Corp. ("Alliance"), does not have a parent corporation, and there is no publicly held company that owns 10% or more of Alliance's stock.

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Petitioner, Alliance Logistics, Inc., n/k/a Alliance 3PL Corp. ("Alliance"), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion dated August 2, 2010 is reported at 614 F.3d 703. The opinion is reproduced in the appendix hereto ("App.") at 3a-10a. The Seventh Circuit's August 30, 2010 order denying Alliance's Petition for Rehearing En Banc or, in the Alternative, Panel Rehearing is not reported and is reproduced at App. 2a.

JURISDICTION

The Seventh Circuit entered its opinion and judgment on August 2, 2010. App. at 3a-10a. The Seventh Circuit entered its order denying Alliance's timely filed Petition for Rehearing En Banc or, in the Alternative, Panel Rehearing on August 30, 2010. App. at 2a. This Court's jurisdiction is proper pursuant to 28 U.S.C. §§ 1254(1) & 2101(c).

STATUTES INVOLVED

The issue raised in this Petition involves Federal Rule of Civil Procedure 50(a), which provides:

> (a) Judgment as a Matter of Law.
>
> > **(1) In General.** If a party has been fully heard on an issue during a jury

> trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> > (A) resolve the issue against the party; and
> >
> > (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.
>
> (2) **Motion.** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

Fed. R. Civ. P. 50(a).

STATEMENT OF THE CASE

On August 31, 2007, Petitioner Alliance Logistics, Inc. ("Alliance") filed a Complaint in the United States District Court for the Northern District of Illinois[1] against Respondent New Prime, Inc. ("Prime") for soliciting, and eventually acquiring, the bulk tanker logistics business from Loders Croklaan USA, LLC ("Loders"), one of Alliance's primary customers, in violation of the parties' motor carrier services contract. R.1.[2] The dispute centered on the relationship between three common players in the trucking industry. Alliance is a third-party logistics provider. Tr.I:124, 128-29. Shippers outsource the management of their internal traffic or logistics to Alliance. Tr.I:125. Prime is a motor carrier that is primarily in the business of hauling goods for shippers, as opposed to providing logistics management. Tr.III:3 & 4. Loders is a manufacturer of edible oils for use in foods and is a substantial user of bulk tanker transportation services. Tr.I:132 & 137. In the trucking industry, Loders is referred to as a shipper that uses logistics management providers (like Alliance) and motor carriers (like Prime) to transport its goods. *Id.* at 132.

In April 2000, Alliance and Prime entered into the motor carrier services contract that is the subject of

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1. The district court's subject matter jurisdiction was based on diversity pursuant to 28 U.S.C. § 1332(a)(1).

2. Cites to "R." are cites to the Record on Appeal and cites to "Tr." are cites to the Transcripts of Proceedings that were held before the district court and made part of the Record on Appeal.

this lawsuit. R. 180, PX1; Tr. 1:102. In March 2003, Alliance began managing Loders's logistics by providing and coordinating all of the outbound transportation of Loders's products. R.180, PX3; Tr.I:136. Prior to 2003, Prime hauled "very few loads" to and from a Loders's facility as a common carrier on a per load basis. Tr.V:17; R.180, PX65. Prime never provided logistics management services to Loders and did not even know the identity of Loders's logistics director or supply chain director in 2003. Tr.III:23, 215.

After entering into the motor carrier services contract, Alliance, while managing Loders's logistics, occasionally used Prime as a motor carrier for some of Loders's bulk tanker transportations needs. Prime thereafter used the connections that it made through Alliance's relationship with Loders to solicit Loders and replace Alliance as Loders's logistics manager. Tr.I:161; R.180, PX48.

A key issue at trial concerned the interpretation of the "back-solicitation clause" in the April 2000 contract between Alliance and Prime. That clause provides:

> [Prime] shall not solicit traffic from any shipper, consignee or customer of [Alliance] where [Prime] first knew of the availability of such traffic as a result of [Alliance's] efforts or the traffic of [Alliance], consignee or customer of [Alliance] was first tendered to carrier by [Alliance].

R.180, PX1, ¶ 11 (emphasis added). Prime contended that "traffic" was unambiguous and referred only to the

hauling of goods. Tr.V:17; R.180, PX65. Alliance contended that "traffic" was ambiguous and included not only the hauling of goods, but also included the management of a shipper's logistics—the business in which Alliance, as a third-party logistics provider, was primarily involved and intended to protect.

During trial, Alliance submitted evidence that "traffic," as used in the transportation industry, included the management of a shipper's logistics. Specifically, Dan Rimkus, Alliance's owner and president, described Alliance as a third-party logistics management company, or domestic freight forwarder that specializes in logistics relating to bulk tanker transportation. Tr.I:124-25, 128-30. Mr. Rimkus explained that shippers, like Loders, "outsource their internal traffic or logistics department" to Alliance and Alliance, in turn, "act[s] as that arm of their company." *Id.* at 125. Mr. Rimkus, who has been in the transportation business for 19 years (Tr.I:125-26), specifically testified that the term "traffic" includes the logistics management that is required to transport a shipper's goods. Tr.II:69-70. Mr. Rimkus explained that "traffic" obviously meant logistics management because: "that's the business [Alliance] is in. [Alliance is] not a carrier. [Alliance] operate[s] as a logistics management company." *Id.* Prime never objected to Mr. Rimkus's testimony regarding "traffic."

Prime filed a Motion for JMOL pursuant to Federal Rule of Civil Procedure 50(a). R.117. However, Prime did not argue in the Motion for JMOL that Alliance failed to provide sufficient evidence regarding the meaning of "traffic." Rather, Prime maintained that "traffic" was unambiguous, meant only the hauling of

goods, and, therefore, Prime did not breach the contract as a matter of law. *Id.* at 4-5. The district court—Judge Elaine E. Bucklo—denied the Motion for JMOL and specifically noted that there was "conflicting" evidence relating to the meaning of "traffic" in the record. Tr.V:65.

Prime never contended that there was insufficient evidence of the definition of "traffic" prior to the district court sending the case to the jury. To the contrary, during the jury instruction conference that followed the district court's denial of Prime's Motion for JMOL, Prime's counsel expressly advised the court that "[t]here's been testimony on ['traffic'] from both sides" and that "[t]he jury will decide what the definition of 'traffic' is educated by the witnesses in this case." Tr.IV:127-28.

In the end, the jury agreed with Mr. Rimkus that "traffic," as used in the April 2000 contract between Alliance and Prime, included the management of Loders's logistics. After the jury verdict, Prime filed a Renewed Motion for JMOL pursuant to Fed. R. Civ. P. 50(b). R.137. In the Renewed Motion, Prime again argued that "traffic" was unambiguous (*i.e.*, limited to the hauling of goods) and that the district court should have concluded that Prime did not breach the contract as a matter of law regardless of the evidence submitted on the issue. *Id.* at 3-5.

On appeal, Prime again did not argue that Alliance failed to provide sufficient evidence regarding the meaning of "traffic" or that Mr. Rimkus's testimony was deficient or inadmissible. Rather, Prime again argued that the meaning of "traffic" "is clear and unambiguous

[and] the district court should have ruled as a matter of law." Prime's App. Br. at 19, 21 & 24.

On August 2, 2010, the Seventh Circuit, in an opinion by Chief Judge Frank Easterbrook, reversed the jury verdict and judgment that had been entered by Judge Elaine E. Bucklo and directed entry of judgment in favor of Prime. The Seventh Circuit did not find that "traffic" was unambiguous. Indeed, the Seventh Circuit agreed that "traffic" was ambiguous. App. 7a. Nevertheless, the Seventh Circuit reversed the jury verdict because Alliance supposedly failed to provide any evidence regarding the meaning of "traffic"—an argument that was never raised in Prime's Rule 50(a) Motion for JMOL, Rule 50(b) Renewed Motion for JMOL, or appellate brief, and, in fact, was completely incorrect. *Id.* at 9a.

Alliance filed a Petition for Rehearing, in which it argued that the Seventh Circuit erred in considering a sufficiency of the evidence issue that was not raised in Prime's Rule 50 motions. The Seventh Circuit denied the Petition for Rehearing in a terse, one-paragraph Order, again drafted by Judge Easterbrook, which states:

> Plaintiff-appellee filed a petition for rehearing and rehearing en banc on August 13, 2010, contending principally that by not making a proper motion under Fed. R. Civ. P. 50 appellant forfeited the argument that this court accepted. The forfeiture argument has itself been forfeited, because it was omitted from appellee's brief even though appellant

> requested an outright reversal under Rule 50 as well as a new trial.

App. 2a. In other words, according to the Seventh Circuit, Alliance, as the appellee and jury verdict winner, should have prognosticated, and then rebutted, an issue that was never raised in Prime's Rule 50(a) Motion for JMOL, Prime's Rule 50(b) Renewed Motion for JMOL, or Prime's appellate brief.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's decision conflicts directly with Federal Rule of Civil Procedure 50, as well as this Court's precedent.

"'[A]n appellate court may not order [JMOL] where the verdict loser has failed **strictly** to comply with the procedural requirements of Rule 50(b).'" *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 402 n. 4 (2006) (emphasis added, quoting *Neely v. Martin K. Eby Constr. Co., Inc.*, 386 U.S. 317, 325 (1967)). Rule 50 mandates, and this Court has expressly held, that a verdict loser cannot file a post-verdict Rule 50(b) renewed motion for JMOL unless that party sought relief on "similar grounds" in its pre-verdict Rule 50(a) motion for JMOL. *Exxon Shipping Co. v. Baker*, 127 S.Ct. 2605, 2617 n. 5 (2008). In this case, Prime never raised a sufficiency of the evidence issue regarding "traffic" in its Rule 50(a) Motion for JMOL or Rule 50(b) Renewed Motion for JMOL (or even in its appellate brief). By raising *sua sponte* an issue that was not raised in Prime's Rule 50 motions, the Seventh Circuit's decision in this case is in direct conflict with Rule 50

and this Court's precedent in *Unitherm*, *Neely*, and *Exxon Shipping*. The importance of this issue cannot be overlooked, as it arises time and again at both the circuit court and district court level, and will continue to reoccur if the Seventh Circuit's conduct in this case is permitted to stand.[3]

Federal Rule of Civil Procedure 50 sets forth the procedural requirements for challenging the sufficiency of the evidence in a civil jury trial and establishes two stages for such challenges—prior to submission of the case to the jury, and after the verdict and entry of judgment. *Unitherm*, 546 U.S. at 399. Rule 50(a) allows a party to challenge the sufficiency of the evidence prior to submission of the case to a jury by filing a motion for JMOL. Fed. R. Civ. P. 50(a). Rule 50(b) allows a party to challenge the sufficiency of the evidence after the jury verdict and entry of judgment by renewing a previously filed motion for JMOL. Fed. R. Civ. P. 50(b).

One of Rule 50's main purposes is to ensure that a party has an opportunity to cure a potential deficiency in its proof. To this end, Rule 50 expressly requires that a nonmovant be "fully heard" before a court can issue a judgment as a matter of law against it. Fed. R. Civ. P. 50(a)(1). The purpose behind this requirement is expressly stated in the advisory committee notes: "In **no event** . . . should the court enter judgment against a party who has not been apprised of the materiality of

3. *See, e.g., Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 903 (11th Cir .2004); *American & Foreign Ins. Co v. Bolt*, 106 F.3d 155 (6th Cir. 1997); *Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th Cir. 1990).

the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact." Fed. R. Civ. P. 50(a) advisory committee notes to 1991 Amendment (emphasis added).

In addition, Rule 50 expressly requires that a motion for JMOL "must specify . . . the law and facts that entitle the movant to the judgment." Fed. R. Civ. P. 50(a)(2). The reason for this requirement is also explicitly set forth in the advisory committee notes:

> The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies.

Fed. R. Civ. P. 50(a) advisory committee notes to 1991 amendments; *see also* Fed. R. Civ. P. 50 advisory committee notes to 2006 amendments ("The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available.").

This Court has expressly held that "[a] motion under Rule 50(b) is not allowed unless the movant sought relief on similar grounds under Rule 50(a) before the case was submitted to the jury." *Exxon Shipping*, 127 S.Ct. at 2617 n. 5. This Court's holding in *Exxon* is in accord

with Rule 50's language, as well as the purpose behind the Rule. The 1991 advisory committee notes expressly state: "A post-trial [50(b)] motion for judgment can be granted **only** on grounds advanced in the pre-verdict motion." Fed. R. Civ. P. 50(b) advisory committee notes to 1991 amendment. *Id.* Indeed, Rule 50(b) refers only to a "**renewed** motion for judgment as a matter of law," as opposed to a "new" motion. Fed. R. Civ. P. 50(b). The 2006 advisory committee notes explain:

> Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available.

Fed. R. Civ. P. 50(b) advisory committee notes to 2006 amendment.

The Seventh Circuit violated Rule 50 by reversing a jury verdict on an insufficiency of the evidence issue that was never raised in Prime's pre-verdict Rule 50(a) Motion for JMOL. Although Prime filed a pre-verdict Motion for JMOL, it never argued that Alliance submitted insufficient evidence regarding the definition of "traffic." Thus, Alliance was never put on notice that there was a problem with its proof related to the definition of "traffic," let alone provided with a "clear" opportunity to present additional evidence on the issue. Fed. R. Civ. P. 50 advisory committee notes to 2006 amendments. Rather, Prime conceded that both parties

submitted evidence regarding the definition of traffic and that the jury should decide the issue. Tr.IV:127-28. And, Judge Bucklo commented that the parties presented "conflicting" evidence regarding the meaning of "traffic." Tr.V:65. Nevertheless, the Seventh Circuit decided *sua sponte* that there was insufficient evidence of the definition of "traffic" in the record. This is a clear violation of Rule 50(a). Indeed, insofar as Rule 50(a) is intended "to assure the responding party an opportunity to cure any deficiency in that party's proof," no such "opportunity" was given to Alliance in this case because Alliance was never informed by Prime or the district court of the dispositive facts on which it should have introduced evidence. Fed. R. Civ. P. 50(a) advisory committee notes to 1991 amendment.

The Seventh Circuit also violated Rule 50 by reversing a jury verdict on an insufficiency of the evidence issue that was never raised in Prime's post-verdict Rule 50(b) Renewed Motion for JMOL. In *Unitherm*, this Court held that a verdict loser's failure to comply with Rule 50(b) deprives the appellate court of the power to even order a new trial. 546 U.S. at 401. It is certainly beyond an appellate court's power to go a step further and direct entry of judgment. *See id.* at 402 (explaining the reasons behind this Court's ruling in *Unitherm* "apply with equal force whether the party is seeking judgment as a matter of law or simply a new trial"). Here, Prime never argued in its Renewed Motion for JMOL that Alliance submitted insufficient evidence regarding the definition of "traffic." Indeed, Prime could not make any such argument in its Renewed Motion for JMOL because, as discussed above, Prime failed to make those arguments in its pre-verdict Motion for JMOL.

See Exxon Shipping, 127 S.Ct. at 2617 n. 5. Prime's failure to argue that there was insufficient evidence regarding the meaning of "traffic" in its Renewed Motion for JMOL "deprives the appellate court of the power to order entry of judgment" in favor of Prime on that issue. *Unitherm*, 546 U.S. at 401. In direct violation of *Unitherm* and *Exxon Shipping*, the Seventh Circuit took it upon itself to review the sufficiency of the evidence regarding the meaning of "traffic," even though Prime did not (and could not) raise this issue in its Rule 50(b) motion or appellate brief.

By raising *sua sponte* an issue that is unreviewable due to the Prime's failure to properly include it in a Rule 50(a) Motion for JMOL or Rule 50(b) Renewed Motion for JMOL, the Seventh Circuit's decision is in direct conflict with Rule 50 and the Supreme Court's decisions in *Unitherm* and *Exxon Shipping*. Accordingly, this Court should issue a writ of certiorari to the Seventh Circuit and reverse the Seventh Circuit's opinion and judgment entered on August 2, 2010.

II. The Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers.

"This Court has a significant interest in supervising the administration of the judicial system." *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010). To this end, Supreme Court Rule 10(a) provides that a compelling reason for granting a writ of certiorari exists where "a United States court of appeals . . . has so far departed from the accepted and usual courses of judicial proceedings . . .

as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). The Court's exercise of its supervisory power arises or is implicated when the "integrity of judicial processes" is at issue. *Hollingsworth*, 130 S. Ct. at 713. This is such a case.

In this case, the Seventh Circuit did not merely reverse a jury verdict based on a sufficiency of the evidence issue never raised in the trial court. Rather, by basing its decision on an issue that was never contemplated by the parties and never briefed in the district court or on appeal, the Seventh Circuit made several factual assumptions that are simply incorrect and unsupported by the record and then completely deprived Alliance of the opportunity to be heard on these issues.

Judge Easterbrook's opinion incorrectly assumed that "Alliance's evidence [only] concerned how may loads Prime had carried for Loders . . ., rather than the meaning of the term 'traffic.'" 614 F.3d at 706. Judge Easterbrook also incorrectly assumed that Alliance contended in the District Court that "traffic" meant "*volume* of transportation services" or "increase in traffic" or "oodles of traffic." *Id.* at 705-06.[4] In addition, Judge Easterbrook incorrectly found that Alliance did

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4. The Seventh Circuit appears to have based these incorrect assumptions on the parties' summary judgment materials, rather than what was actually presented at trial or the briefing on Prime's Rule 50 motions. *Id.* at 705. Indeed, the Seventh Circuit never discusses Prime's Rule 50 motions or whether they argue that there is insufficient evidence as to the definition of "traffic."

not "introduce[] any evidence about how people in the transport business understand the word traffic."[5] *Id.* at 705.

All of these factual findings by Judge Easterbrook completely ignore the testimony of Mr. Rimkus, who specifically testified, without objection by Prime, that the term "traffic" obviously means logistics management—"the business [Alliance] is in." Tr.II:69-70. Indeed, there was never any issue in the district court regarding whether Alliance presented sufficient evidence as to the definition of "traffic." Rather, Prime conceded that "[t]here's been testimony on ['traffic'] from both sides" and that "[t]he jury will decide what the definition of 'traffic' is educated by the witnesses in this case" (Tr.IV:127-28), and Judge Bucklo noted that parties presented "conflicting" evidence on the issue (Tr.V:65).[6] Such basic mistakes by an appellate court judge—who was not present at trial—are inevitable

5. Judge Easterbrook also found that Alliance's expert, Robert Walters, did not testify to the definition of "traffic," but only "testified that shippers usually notify 3PL companies of their existing clientele, which may be provided for expressly in a back-solicitation clause." *Id.* Judge Easterbrook overlooked the fact that Mr. Walters was precluded from testifying as to the definition of "traffic." R.76:8; Tr.IV:22-25. Had Prime properly raised the definition of traffic issue in a Rule 50 motion, Alliance would have at a minimum made an offer of proof regarding Mr. Walter's testimony.

6. Even though both parties agreed in the district court that the definition of "traffic" should be decided by the jury based on the evidence presented, Judge Easterbrook in his opinion criticized Judge Elaine Bucklo for being "non-directive" on the issue of the definition of "traffic." 614 F.3d at 705.

when, as in this case, a party is deprived of the opportunity to be heard on an issue. Indeed, this case illustrates the wisdom of this Court's observation in *Unitherm* that the "'[d]etermination of whether a trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.'" *Unitherm*, 546 U.S. at 401 (quoting *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 218 (1947)).

Finally, when Alliance raised the Rule 50 issue in a timely filed Petition for Rehearing, the Seventh Circuit held that Alliance "forfeited" its Rule 50 arguments "because it was omitted from [Alliance's] brief." App. at 2a. In other words, according to the Seventh Circuit, Alliance, as the appellee and jury verdict winner, should have somehow prognosticated, and then rebutted, an issue that was never raised in Prime's Rule 50(a) Motion for JMOL, Prime's Rule 50(b) Renewed Motion for JMOL, or Prime's appellate brief. This fundamentally unfair logic "so far depart[s] from the accepted and usual courses of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). It also deprives Alliance of the most basic premises of due process—notice of an issue to be decided and the opportunity to be heard on that issue.

Accordingly, this Court should issue a writ of certiorari to the Seventh Circuit and reverse the opinion and judgment entered on August 2, 2010.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted and the opinion and judgment of the Seventh Circuit should be reversed.

Dated: November 29, 2010.

Respectfully submitted,

DANIEL P. ALBERS
Counsel of Record
WILLIAM M. MCERLEAN
BRAD E. RAGO
JAMES E. MICHEL
BARNES & THORNBURG, LLP
One North Wacker Drive,
Suite 4400
Chicago, Illinois 60606
(312) 357-1313
dalbers@btlaw.com

Attorneys for Petitioner

APPENDIX

APPENDIX A — ORDER FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ENTERED AUGUST 30, 2010

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
August 30, 2010

Appeal from the United
States District Court for the
Northern District of Illinois, Eastern Division.

No. 07 C 4944

Elaine E. Bucklo, *Judge.*

Before
FRANK H. EASTERBROOK, *Chief Judge*
MICHAEL S. KANNE, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*

No. 09-3489

ALLIANCE 3PL CORPORATION, formerly known
as Alliance Logistics, Inc.,

Plaintiff-Appellee,

v.

NEW PRIME, INC., doing business as Prime, Inc.,

Defendant-Appellant.

Appendix A

Order

Plaintiff-appellee filed a petition for rehearing and rehearing en banc on August 13, 2010, contending principally that by not making a proper motion under Fed. R. Civ. P. 50 appellant forfeited the argument that this court accepted. The forfeiture argument has itself been forfeited, because it was omitted from appellee's brief even though appellant requested an outright reversal under Rule 50 as well as a new trial. The argument therefore does not require any change in our decision. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

* Judge Flaum and Judge Tinder did not participate in the consideration of this petition.

APPENDIX B — DECISION FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DECIDED AUGUST 2, 2010

In the
United States Court of Appeals
For the Seventh Circuit

No. 09-3489

ALLIANCE 3PL CORPORATION, formerly known as Alliance Logistics, Inc.,

Plaintiff-Appellee,

v.

NEW PRIME, INC., doing business as Prime, Inc.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 07 C 4944—**Elaine E. Bucklo**, *Judge.*

ARGUED FEBRUARY 18, 2010—
DECIDED AUGUST 2, 2010

Before EASTERBROOK, *Chief Judge*, and KANNE and ROVNER, *Circuit Judges.*

EASTERBROOK, *Chief Judge.* Alliance 3PL Corporation handles the transportation needs of its

customers. It purchases transportation services from air, water, and land carriers, and it allocates this capacity to customers that need to move their own goods or supplies. Alliance may be able to consolidate multiple customers' shipments into full loads, reducing the cost per ton-mile; even if it cannot do this, a transport-management service enables customers to concentrate on their core businesses and stop fretting about shipping. The 3PL business (for third-party logistics management) is an aspect of the division of labor. The Wikipedia entry "3PL" describes other functions that firms such as Alliance perform; today's dispute arises from its role in arranging for transportation, and we need not discuss warehousing, inventory control, and additional services in the 3PL business.

Until spring 2003 Loders Croklaan USA, a producer of fats and oils used by the food industry, dealt directly with motor carriers. Prime, Inc., was among the carriers that Loders used to move its products to customers from 1998 through 2003. (Some of this transportation was on bills of lading from Loders and some was arranged and paid for by its customers, such as Pillsbury.) In March 2003 Loders hired Alliance to manage its shipping. Alliance employed Prime to haul some of Loders's output. The contract between Alliance and Prime, signed in 2000 when Alliance first used some of Prime's services (obviously for customers other than Loders, which was not yet one of Alliance's clients), contains what the parties call a back-solicitation clause:

> [Prime] shall not solicit traffic from any shipper, consignee, or customer of [Alliance]

> where [Prime] first knew the availability of such traffic as a result of [Alliance's] efforts or the traffic of [Alliance], consignee, or customer of [Alliance] was first tendered to [Prime] by [Alliance].

A jury concluded that Prime violated this clause by carrying bulk goods for Loders after the Loders-Alliance contract ended in 2007, and it awarded Alliance about $2.2 million in damages. The district court denied Prime's motions under Fed. R. Civ. P. 50 and 59.

Prime carried freight for Loders while the Alliance contract was in effect and submitted a bid to Loders to do the same work after the Alliance contract ended. The parties debate whether Prime "solicited" this business: Prime says that Loders took the initiative (the contract between Alliance and Loders did not prohibit Loders from placing business with carriers that Alliance had used), while Alliance says that Prime inveigled Loders to request a bid and thus effectively solicited Loders's business. Like the district court, we think that the evidence allowed a reasonable jury to resolve that question in Alliance's favor.

It is undisputed that Prime had carried some of Loders's goods (including bulk cargo in tankers) for years before Loders hired Alliance to manage its shipping. This leads Prime to contend that it did not "first know the availability of such traffic as a result of" Alliance's efforts. A back-solicitation clause ensures that a carrier (such as Prime) introduced to a shipper (such

as Loders) through a 3PL won't poach the business; it effectively allocates to the 3PL the property right in information about which shippers need what transportation service. But Prime did not learn about Loders, or its business, through Alliance; Prime already had that information because it had been picking up freight from Loders since 1998. Whether Loders, Pillsbury, or someone else arranged for any given shipment during 1998 to 2003, and whether those shipments were arranged by long-term contract or spot transactions, the fact remains that Prime's knowledge of Loders's business was acquired independent of Alliance.

Prime contended that it was entitled to summary judgment because it did not learn about Loders's traffic through Alliance. The 3PL replied that Loders substantially increased the volume of its bulk shipping in tankers during 2005 and 2006, while the Loders-Alliance contract was in place, and that Prime had increased the size of its own tanker fleet as a result. Alliance contended that Prime learned of this incremental "traffic" through Alliance, and that the back-solicitation clause therefore blocked Prime from carrying any freight for Loders (or at least any more of Loders's freight than it had been carrying before March 2003). Prime contended, to the contrary, that the word "traffic" in a back-solicitation clause refers to the existence of a shipper, and the general nature of its transportation needs, rather than the gross weight of goods that the shipper tenders to carriers. On this understanding Prime did not learn of Loders's "traffic" through Alliance.

Appendix B

When denying Prime's motion for summary judgment, the district judge stated that the word "traffic" is ambiguous. Come the trial, the judge did not define the word for the jury. Nor did the judge tell the jurors that they needed to decide whether the word "traffic" means the *existence* of a shipper and the general nature of its needs, or instead means the *volume* of transportation services a (known) shipper requires. The judge gave the jurors no guidance on that topic and did not frame any concrete question that required resolution. Instead the judge allowed both sides to argue their positions.

Because the judge was non-directive (something that the parties knew long before the jury instructions were delivered), each side attempted to bolster its position with testimony from experts. The meaning of "traffic" might depend, for example, on the customs and general understandings of the industry, and then the jurors would need evidence about usage of trade to reach a verdict. But neither side introduced any evidence about how people in the transport (or 3PL) businesses understand the word "traffic." Instead Alliance produced an expert who testified that shippers usually notify 3PL companies of their existing clientele, which may be provided for expressly in a back-solicitation clause.

When Prime argued on appeal that experts should not be allowed to define words in legal documents—that this is a function for the judge, see *Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d

898 (7th Cir. 1994)—Alliance replied that its expert had not so much as hinted at the meaning of the word "traffic" but had simply furnished the jurors with background about the industry. For its part, Prime tendered an expert who proposed to testify that the background narrated by Alliance's expert was not factual. The district judge prevented Prime's expert from testifying about that subject, and Prime protests the asymmetric treatment. Whether the judge abused her discretion in the handling of the expert testimony is another topic we need not explore, because Alliance's disclaimer of any trade-specific meaning of the word "traffic" undermines the verdict. Alliance's evidence concerned how many loads Prime had carried for Loders before March 2003, rather than the meaning of the word "traffic". The jury evidently concluded that Prime should be held to its old level of business after the Loders-Alliance contract ended. But that's possible only if "traffic" has the meaning that Alliance favors.

Prime relies on the ordinary meaning of the word "traffic" plus the ordinary function of a clause such as this one: to prevent the carrier from poaching business that it learned about only through the 3PL's (costly) efforts to match a shipper with the optimal carrier. Had it never done any business through Alliance, Prime was bound to get in contact with Loders again as soon as Alliance ceased to be Loders's sole agent for procuring transport. Prime's straightforward position has the support of Illinois law, which supplies the rule of decision: Illinois understands non-compete clauses to cover no more than the reasonable import of their language and

does not allow expansive readings of restrictive covenants, because more competition often serves the public interest in low prices. See *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 447, 879 N.E.2d 512, 522 (2007).

A party that wants to depart from a straightforward understanding of contractual language has two principal routes: parol evidence and usage of trade. Yet Alliance did not offer any parol evidence showing that, when Prime and Alliance negotiated their contract, they discussed what the word "traffic" means, or that the negotiation history favors one meaning of "traffic" over another. This leaves the possibility that "traffic" is a term of art in the transportation business. As we have recounted, however, Alliance denies that its expert testified about usage of trade. Reading "traffic" to mean "increase in traffic" or "oodles of traffic" therefore lacks any support on this record. At oral argument, Alliance's lawyer suggested that the expert's testimony supports reading "traffic" to mean "the sort of freight carried under this contract"—but if that's the word's meaning, then Alliance loses, because Prime did not learn through Alliance that Loders ships fats and oils in bulk tankers, and the back-solicitation clause covers only traffic that Prime "first knew" about as a result of doing business with Alliance.

The people who were managing Loders and Prime in 2009, when the case was tried, testified that in 2005 and 2006 they did not know what freight Prime had carried for Loders from 1998 through 2003. The

knowledge of Loders's managers is irrelevant under the back-solicitation clause, which asks what Prime knew rather than what Loders remembered. And the fact that Prime's managers, hired after 2003, had not been briefed about Prime's work for Loders while their predecessors were in charge does not affect the fact that Prime as an entity knew about the subject (which the new managers eventually brushed up on). A corporation knows what its managers know, and it does not acquire amnesia when the management team changes. See *Prime Eagle Group Ltd. v. Steel Dynamics, Inc.*, No. 09-1663 (7th Cir. July 27, 2010). By 2007, when Prime bid on the Loders business, its managers were cognizant of the work Prime had done for Loders in 1998 to 2003.

Although Prime first knew in 1998 (if not earlier) about Loders's traffic, it might have been possible for Alliance to argue that it did not know about "such" traffic. The word "such" might carry the weight that Alliance tried to place on "traffic". But Alliance did not contend in the district court, or in its appellate brief, that the word "such" designates an increase or change in traffic during the contract's term. Prime reads "such" as a reference to earlier mentions of "traffic"—legalese for the proposition that "this use of the word 'traffic' refers to the same 'traffic' that this clause already mentioned." That seems to us the most likely meaning of "such" in this clause. See Bryan A. Garner, *A Dictionary of Modern Legal Usage* 849 (2d ed. 1995). The district court therefore should have granted Prime's motion under Rule 50 for judgment as a matter of law.

REVERSED